

ADVERTISING

IN THE LEGAL PROFESSION

Sure, it's legal, but is it kosher?

by Bart Durham

It is not surprising that strict rules were set out to maintain the “dignity of the profession.” Foremost among them was the prohibition against the solicitation of business by lawyers.

A discussion of legal advertising has to begin with events long before the U.S. Supreme Court held it permissible in the landmark case of *Bates v. State Bar of Arizona* (1977) 433 U.S. 350.

Our law is derived from the common law of England. In early England the population was illiterate, and only a few privileged people could read or write. The king's secretary was called a chancellor. Later when the king established courts he referred disputes to his secretary. We still call some of our judges in Tennessee *chancellor* although this name has fallen out of use in other parts of the country.

Eventually through the centuries a lawyer class of educated citizens evolved. They were people who could read and write and were specialized in bringing disputes to the chancellors and speaking on behalf of the untutored litigants. Illiteracy was high in past centuries, and these people were needed to assist the courts.

Today there is the concept of “functional illiteracy,” and the National Institute for Literacy estimates that 22 per cent of the population falls into that category.

What does it mean to be functionally illiterate? Citizens who are functionally illiterate are often unable to complete an employment application. They are unable to read an in-depth newspaper article or gain valuable information from reading a history, science, or sociology book. They are unable to enjoy an entertaining and unforgettable novel unless they listen to the book on tape.

State of Literacy in America: Estimates at the Local, State, and National Levels by Stephen Reder lists Nashville as 20 per cent level-one illiterate and Murfreesboro as 16 per cent level-one illiterate.¹

Where do these people who operate at level-one illiteracy get their information? It comes from television or word of mouth. It

would seem that there is a real need to get information to this group in a manner that would educate and inform.

Traditionally lawyers have been educated and thus “elite.” Like all trade unionists, they have done everything possible to maintain their privileged status. Each year the bar admissions get more rigorous. Requirements to attend law school increase in difficulty. Students who graduated in my day possibly would not qualify for admission today.

It is not surprising that strict rules were set out to maintain the “dignity of the profession.” Foremost among them was the prohibition against the solicitation of business by lawyers. The myth was that lawyers waited for clients to come to them due to their hard-earned reputations.

In an agrarian, more noncommercial society, that functioned well. Everybody knew everybody. Lawsuits traditionally were matters of divorce, criminal law, and petty disputes. A class of lawyers grew up handling these types of cases and was readily accessible. More substantial commercial matters involved more sophisticated clients who had access to information regarding which lawyers were most appropriate.

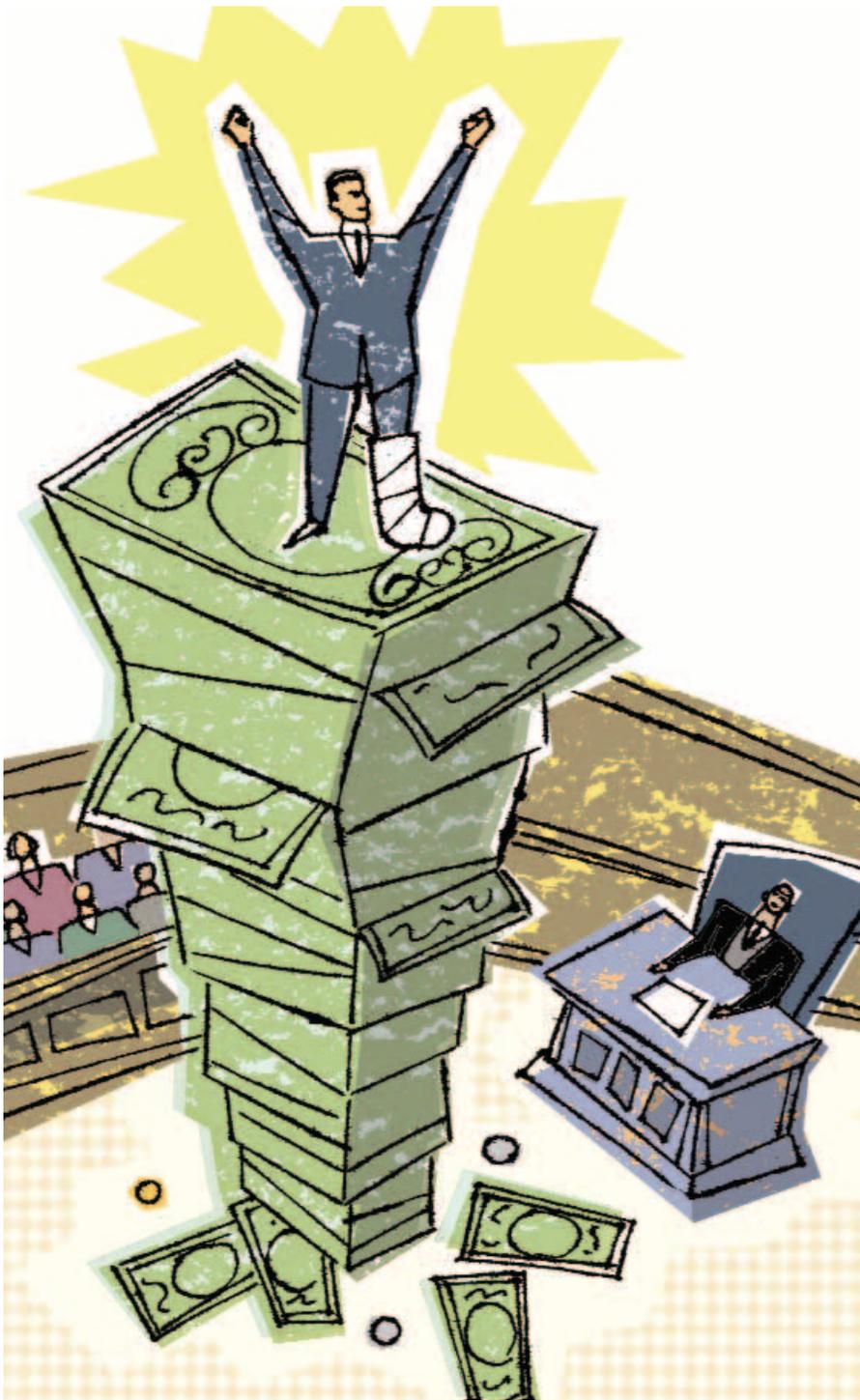
Average citizens who had been injured in an accident or had a dispute with the government might be uninformed. They might talk to numerous lawyers before they found one who would handle this particular type of case.

My Personal Experiences as a Lawyer Who Advertises

I finished law school in 1963 and practiced with my father in the small Tennessee town of Ripley, 50 miles from the nearest city of Memphis. A year later I went to work in the U.S.

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attorney's office, and three years later in the state attorney general's office. My duties as an assistant attorney general involved constitutional law issues based on my previous experience in government.

I left to go into private practice in 1975. I had no clients and a wife and child to support. My earliest case came from a medical doctor, Dr. Leonard Brooks of Memphis, who had sent out a solicitation letter to Planned Parenthood asking them to refer him patients. His letter had stated that he would do abortions for \$150.

Planned Parenthood reported this to the state licensing authority, and the state authorities began legal action to revoke his license for violating their ban on doctors engaging in professional advertising.

Dr. Brooks came to me to defend his right to practice medicine. There had been a number of constitutional decisions across the country pro and con on professional advertising. At this time the U.S. Supreme Court had granted a hearing in a case from Arizona involving lawyers who had been disciplined for professional advertising.

I talked by telephone to the lawyers in the Arizona case and numerous other lawyers who had similar constitutional challenges on behalf of pharmacies wanting to advertise prices; doctors; optometrists; and others.

When the Supreme Court ruled in the Arizona case in June 1977 that states could not prohibit lawyers from advertising, I took the ad they had specifically approved and sent it to the *Tennessean* asking them to run the same ad for me.

I got a call from Bill Willis, the *Tennessean's* longtime general counsel, saying that they would run the ad. The next morning it ran in the classified section as an ad but also on the front page as a news story. This was the first such ad for middle Tennessee, just two days after the Supreme Court opinion.

For two years or more, no other attorney advertised, so I had the market all to myself. I did bankruptcies, crimes, divorces, and personal injuries. My ad budget was \$200 a month.

My business grew in two years from a one-man office sharing a secretary with a busy attorney, Tom Moon, to my own office with a staff of six, including another lawyer. My work habits were prodigious. I would arrive at 6 a.m. and not leave until I had put in an obligatory 12 hours. I hired staff only when there was so much work that it was impossible to carry on without more help.

There came a time when I realized that the divorce, crime, and bankruptcy practice was more labor intensive per dollar realized than personal injury practice, and 10 years ago I began focusing on personal injury exclusively.

The perception of lawyers who advertise is that they do a high volume of small cases. That may be correct. I suspect it is wrong, however, for the reason that the cases that come to you are just like the cases you would get if you did not advertise. I view advertising as a tool to get the phone to ring and cases in the door. After that, my job is the same as it would be if all my cases came from more conventional means such as word of mouth.

The average citizen on the street can have all sorts of injuries. Some of the cases we have

handled include a crematorium case against a Tennessee funeral home that referred bodies to the place in Georgia that allegedly threw the bodies in a ditch instead of giving them a proper cremation, several police brutality cases including two very high-profile situations in Wilson County, an action against a Japanese kerosene heater manufacturer for a faulty product (the heater exploded in a trailer near Bowling Green, Kentucky, killing three people), and the high-jacking of a Greyhound bus in Tennessee 10 days after the September 11 attack.

We are presently holding town meetings in Shelbyville and other communities regarding toxic torts at the air force facility there. Our current focus is moving to mass torts.

We are pretty typical of a major firm that advertises in a city the size of Nashville. We have a staff of 15, including four lawyers. Our advertising budget approaches a million dollars a year. Our case load stays at about four hundred cases. We limit the cases we accept to screen out almost all cases that don't involve permanent injuries. The exception might be a companion case. For example, mother and daughter are injured in a car, the mother is severely injured with a broken bone, and the daughter has less serious injuries.

Each year we raise the threshold as to what cases we will accept. Our case load at one time totaled more than seven hundred, with a staff as high as 37. We have found it more profitable and less of a headache to limit the cases and keep the staff small.

At one time I ran a series of business and law seminars for accident attorneys who advertised. We accepted only one firm from each region of the country. The idea was to share our successes and failures in an open and confidential manner. After six seminars I got tired, and that job is currently being done very professionally by Marshall Hughes and Lee Coleman of the firm of Hughes and Coleman in Nashville. They hold two seminars a year, attended by lawyers from all over the country who advertise on television.

Current State of Advertising for Legal Services

The Supreme Court of Tennessee makes the rules. Effective this past March 1, the rules changed somewhat in that lawyers could no longer advertise the results of their cases. This is on the ground that such information could be misleading and create unreasonable expectations.

There are a number of firms in Nashville and throughout our area who advertise. I believe they do a good job for their clients. The competition for the injury dollar is such that any

firm that is not practicing good law cannot survive.

The television ad council notes that each year its attorney advertising increases. Consumers are seeing the yellow page ads increase each year not just for attorneys but for all professionals.

Looking Back

I was in general sessions court the day after I ran my first ad. A defendant charged with drunk driving appeared without a lawyer. The judge sarcastically stated that he saw in the newspaper that there was a lawyer in town the defendant could hire for a hundred dollars.

I had just left the state attorney general's office, and the judges didn't know me. When this judge found out I was in his courtroom, he called me back in his chambers to meet with him privately. I didn't know what to expect. He apologized, told me he thought it was a good thing that I did, and welcomed me to his court.

Several trial judges in Nashville called me to their offices soon after, wished me well, and were personally kind to me. I thought they must have thought I was getting a lot of negative feedback from other lawyers, and they were trying perhaps to level the playing field. I remember with affection the special kindness of Chancellor C. Alan High.

One prominent professional criticized me for advertising some years ago when my wife, an architect, went to consult on a new building. Today this professional also advertises on TV and radio.

The Future

Marketing by professionals will increase. Today we can see ads by one prominent blue chip law firm in the Nashville airport. Hospitals have been advertising for years, and doctors have followed suit.

Legal regulatory agencies such as the courts and bar associations are no longer the products of an earlier conservatism. Yesterday's young lawyers are today's judges and public policymakers.

Since the 1970s the Supreme Court and the FTC have found attorney advertising to be a public service. Although some would argue, the general legal culture seems to be finally catching up. ■

Bart Durham is a personal injury lawyer who was the first attorney to advertise in middle Tennessee (615-242-9000, bart@bartdurham.com).

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¹ February 1998. ED Pubs document EX0035P (<http://www.nijl.gov/reders/reder.htm>).